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IN THE

Supreme Court of the United States

TRIBUNE COMPANY, FOX ENTERTAINMENT GROUP, INC., FOX TELEVISION STATIONS, INC., NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., AND VIACOM INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit erred in upholding, against challenges based on the First Amendment and Due Process Clause of the Fifth Amendment, regulations of the Federal Communications Commission ("FCC") that limit the ownership of licensed TV and radio broadcast stations, including a rule that singles out newspaper owners and subjects them to additional and unique restrictions on ownership of broadcast licenses, on the ground that a rational basis supported the rules.

2. Whether the Third Circuit properly applied Section 202(h) of the Telecommunications Act of 1996, which requires the FCC periodically to determine whether its media ownership rules remain "necessary in the public interest as a result of competition," in finding that the FCC had unduly relaxed its restrictions on ownership of broadcast stations and in failing to set aside the restrictions retained by the FCC.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioners Tribune Company, Fox Entertainment Group, Inc., Fox Television Stations, Inc., NBC Universal, Inc., NBC Telemundo License Co., and Viacom Inc., state as follows:

Tribune Company ("Tribune") owns newspapers and radio and television stations in various cities across the country. Tribune has no parent company. No publicly held corporation owns ten percent or more of Tribune's stock.

The News Corporation Ltd., a publicly held company, owns an interest of 10% or more in both Fox Entertainment Group, Inc., and Fox Television Stations, Inc.

General Electric Co. and Vivendi Universal S.A., publicly held companies, directly or indirectly own an interest of 10% or more in NBC Universal, Inc., and NBC Telemundo License Co.

No publicly held company has an interest of 10% or more in Viacom Inc.

PARTIES BELOW

The parties below are listed in the caption to the Third Circuit opinion, reprinted in the appendix below at Pet. App. 1a-2a.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Tribune Company, Fox Entertainment Group, Inc., Fox Television Stations, Inc., NBC Universal, Inc., NBC Telemundo License Co., and Viacom Inc. respectfully request that this Court grant their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The opinion of the court of appeals is published at 373 F.3d 372 (3d. Cir. 2004) and appears in the Petitioners' Appendix ("Pet. App.") at 1a-189a. The court of appeals' order granting and denying rehearing appears at Pet. App. 671a-673a. The court of appeals' order stating that it would not accept petitions for rehearing *en banc* due to recusals appears at Pet. App. 674a-675a. The order of the Federal Communications Commission ("FCC"), *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13,620 (2003), is reproduced in the Appendix, Pet. App. 190a-670a.

JURISDICTION

The court of appeals entered judgment on June 24, 2004, and granted in part and denied in part a timely petition for rehearing on September 3, 2004. Justice Souter extended the time for filing petitions for certiorari until January 31, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The statute involved in this case is the Telecommunications Act of 1996, Pub. L. No. 104-104, tit. II, § 202, 110 Stat. 56,

110-12 (uncodified), which is reproduced in the Appendix, Pet. App. 676a-679a. The FCC's ownership regulations are reproduced in the Appendix, Pet. App. 659a-670a.

STATEMENT OF THE CASE

This case presents this Court with the opportunity to resolve whether broadcast speech is to be accorded full First Amendment protection and whether the government, consistent with the First and Fifth Amendment, can create ownership restrictions that single out newspaper owners and particularly limit their speech – but not the speech of other major media such as owners of cable television systems and Internet websites.

At issue are the FCC's revised broadcast ownership restrictions. The FCC continued to restrict newspaper owners' control of broadcast stations (albeit in narrowed circumstances), revised rules governing the number of radio and television stations that can be commonly owned in a local area, and revised other station ownership rules. The FCC's rules, and the Third Circuit's decision setting them aside in part because the court found them too deregulatory, rested on the assumption that broadcast speech is not entitled to the full protection of the First Amendment – which was in turn based on this Court's determination, more than thirty-five years ago, that broadcast media were then uniquely important sources of information affected by "spectrum scarcity" that justified regulation that would otherwise offend the First Amendment. See *FCC* v. *National Citizens Committee for Broad.*, 436 U.S. 775, 794-96 (1978) ("*NCCB*"); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

The Third Circuit's conclusion that "spectrum scarcity" today justifies rational basis review of broadcast ownership restrictions directly conflicts with nearly two decades of decisions by the D.C. Circuit. The D.C. Circuit has repeatedly indicated that this Court should revisit its First

Amendment analysis because the "spectrum scarcity" rationale has long been superseded by dramatic technological and competitive developments that have increased the sources of information available to Americans. Indeed, this case falls within each of the three circumstances that this Court has already indicated would separately justify reconsideration of the spectrum scarcity rationale: (i) the FCC acknowledges that the prior cross-ownership rule and local ownership restrictions perpetuated by the Third Circuit's decision inhibit rather than increase the quality and quantity of speech, including diversity of viewpoints, see *Red Lion*, 390 U.S. at 393; (ii) the FCC's order confirms that broadcast channels are no longer uniquely important sources of information, see *Columbia Broad. System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 158 n.8 (1973) ("*CBS*") (plurality opinion); and (iii) actions of both Congress and the FCC "signal" that industry conditions have changed sufficiently to justify reconsideration of whether broadcast speech deserves lesser First Amendment protection, see *FCC* v. *League of Women Voters*, 468 U.S. 364, 376 n.11 (1984).

This case also presents the more specific issue whether speech restrictions can particularly apply to newspaper owners, who – unlike, for example, their competitors who own cable television systems or Internet sites – are limited in their ability to control broadcast stations. The Third Circuit concluded that this singling out of newspaper owners triggered no heightened equal protection concern even though this Court in *NCCB* indicated that equal protection concerns would arise whenever all "major media" are not treated equally. *NCCB*, 436 U.S. at 801. Especially in light of this Court's subsequent decisions that regulation singling out cable television triggers heightened scrutiny and confirming the importance of both cable television and the Internet, see *Turner Broad. System, Inc.* v. *FCC*, 512 U.S. 622, 640-41 (1994) (plurality opinion) ("*Turner I*"); *Reno* v. *ACLU*, 521 U.S. 844, 849-53 (1997), the Third Circuit's rule conflicts

directly with this Court's determinations. Even if that were not so, review would be merited because other courts of appeals have determined that ownership regulations directed to particular industries and affecting speech require heightened scrutiny.

Finally, the Third Circuit's determination that the FCC's prior rules should be perpetuated until that court reviews subsequent FCC orders brings it into conflict with other courts of appeals regarding the proper interpretation of § 202(h) of the Telecommunications Act. The circuit courts have split in their application of § 202(h) to the FCC's periodic review of ownership rules and the appropriate disposition of FCC orders following review.

1. During the early decades of broadcasting, when there were relatively few television and radio stations, the FCC maintained various restrictions on ownership of broadcast stations within the same market. See, *e.g., National Broad. Co.* v. *United States*, 319 U.S. 190 (1943); *United States* v. *Storer Broad. Co.*, 351 U.S. 192 (1956); Pet. App. 11a-12a. The FCC first prohibited cross-ownership of radio and television stations in the same market in 1970, *Multiple Ownership of Standard, FM, and Television Broad. Stations*, First Report and Order, 22 F.C.C.2d 306, ¶ 5 (1970), and continued to maintain other restrictions on ownership of television and radio stations within the same local market. This Court applied a deferential standard of judicial scrutiny to these and other restrictions on broadcast speech on the ground that the "scarcity" of the broadcast spectrum permitted the FCC to impose restrictions on broadcast licensees that would violate the First Amendment if imposed on other speakers. See *Red Lion*, 395 U.S. at 390.

Before 1975, the FCC "allowed, and even encouraged" newspapers to own broadcast stations in their home cities. *NCCB*, 436 U.S. at 797. Notwithstanding this history, the FCC prohibited all future newspaper-broadcast combinations within the same community in 1975 ("the 1975 Newspaper

Rule"). *Multiple Ownership of Standard, FM, and Television Broad. Stations*, Second Report and Order, 50 F.C.C.2d 1046, ¶¶ 62-65 (1975) ("*1975 Order*"). As the FCC readily admitted, this prospective ban was not based on evidence that existing combinations had exerted undue market power or had restricted viewpoint diversity. *See NCCB*, 436 U.S. at 786. To the contrary, the FCC found that, if anything, there was "an undramatic but nonetheless statistically significant *superiority* in newspaper owned television stations in a number of program particulars" irrespective of market size. *1975 Order* ¶ 109 n.26 (emphasis added).

The FCC's 1975 prospective ban on cross-ownership was premised purely on a predictive judgment. Given the limited number of available licenses, and the FCC's perception that the broadcast industry as of 1975 had "matured," the FCC adopted a policy in which diversification of ownership trumped all other considerations. *Id.* ¶¶ 100-102, 112 n.30. Although this Court expressly acknowledged that the FCC had not demonstrated any connection between diversity of ownership and diversity of viewpoints, it deferred to the FCC's expertise, and held that the FCC's prediction that these "'hoped-for'" gains in diversity would materialize was "reasonable" and "rational." *NCCB*, 436 U.S. at 788, 796-97.

2. Since 1975, the number and type of media outlets have increased dramatically. The number of radio and television stations increased substantially, and the FCC has documented in detail how the growth of cable television, satellite video and audio services, the Internet, and other new media – many of which were either new or did not exist at all in 1975 – has led to an unprecedented explosion in the number of platforms for the dissemination of information and public debate. Pet. App. 242a-276a, ¶¶ 86-128. As the FCC concluded below, "the question confronting media companies today is not whether they will be able to dominate the distribution of news and information in any market, but whether they will be able

to be heard at all among the cacophony of voices vying for the attention of Americans." *Id.* at 458a, ¶ 367.

Even by the late 1980s, dramatic industry changes prompted the FCC to begin to repeal or scale back numerous ownership restrictions that had been justified under the spectrum scarcity rationale. The courts uniformly upheld the FCC's elimination of these rules; indeed, the courts often vacated FCC decisions that would have *retained* some of these restrictions. For example, major rules restricting media ownership and operation that had been predicated on the relative lack of competition prior to 1980 were considerably relaxed or eliminated by actions of Congress,[1] the FCC,[2] and the courts[3] – which either rejected the rules as insupportable in the then-existing media environment or as unconstitutional under the First Amendment. By the time of the proceeding at issue here, the only major media ownership rule that had not been modified or re-examined was the 1975 Newspaper Rule.

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[1] *See, e.g.,* Telecommunications Act of 1996, Pub. L. No 104-104, tit. II, § 202(a)-(g), 110 Stat. at 110-11 (uncodified).

[2] *See, e.g., Syracuse Peace Council* v. *WTVH*, 2 FCC Rcd. 5043, ¶¶ 37 n.106, 55 (1987), *aff'd, Syracuse Peace Council* v. *FCC*, 867 F.2d 654, 661-62 (D.C. Cir. 1989) (repealing fairness doctrine); *Amendment of the Broad. Multiple Ownership Rules,* 4 FCC Rcd. 1741 (1989) (relaxing policy for waivers permitting radio/television cross-ownership); *Revision of Radio Rules & Policies*, 7 FCC Rcd. 2755 (1992) (relaxing limit on local ownership of AM and FM stations and raising national radio cap); *Review of the Prime Time Access Rule,* 11 FCC Rcd. 546 (1995).

[3] *See, e.g., Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027 (D.C. Cir.) (vacating ban on cable/broadcast cross-ownership), *modified on reh'g,* 293 F.3d 537 (2002), *Chesapeake & Potomac Tel. Co.* v. *United States,* 42 F.3d 181 (4th Cir. 1994) (invalidating statutory prohibition on cable/telephone cross-ownership under First Amendment); *US WEST, Inc.* v. *United States,* 48 F.3d 1092 (9th Cir. 1994), *vacated*, 516 U.S. 1155 (1996) (same); *Schurz Communications Inc.* v. *FCC,* 982 F.2d 1043 (7th Cir. 1992) (finding financial interest and syndication rules unreasonable and unsupported); *Sinclair Broad. Co.* v. *FCC*, 284 F.3d 148, 158-65 (D.C. Cir. 2002).

3. Recognizing the dramatic transformation that had taken place in the media industry, Congress repealed or relaxed several prohibitions on media ownership in the Telecommunications Act of 1996. Telecommunications Act of 1996, Pub. L. No 104-104, tit. II, § 202(a)-(g), 110 Stat. at 110-11 (uncodified). Congress also required the FCC "to continue the process of deregulation" (*Fox*, 280 F.3d at 1033) by conducting a review every two years to determine whether the remaining media ownership restrictions, including the 1975 Newspaper Rule, remained "necessary in the public interest as a result of competition. Pub. Law No. 104-104, § 202(h), 110 Stat. at 111-12.[4] If the Commission could not conclude that a rule remained necessary, Congress required the FCC to repeal or modify it. *Id.*

The first two of these biennial reviews, in 1998 and 2000, produced only marginal additional deregulation, and the FCC's refusal to further relax its media ownership rules resulted in two judicial reversals. In *Fox*, the D.C. Circuit held that the FCC had not adequately explained its decision to retain the national television ownership rule (which prohibited any entity from controlling television stations with a combined potential audience reach of 35% of television households) and remanded the matter to the FCC. *Fox*, 280 F.3d at 1040-50. The D.C. Circuit also found in *Fox* that the FCC had not adequately justified the ban on cable/broadcast cross-ownership, but the court vacated that rule instead of remanding it, because the court concluded that justifying such a rule would be a "hopeless cause." *Id.* at 1050-53. Separately, in *Sinclair Broad. Co.* v. *FCC*, 284 F.3d 148, 158-65 (D.C. Cir. 2002), the D.C. Circuit held that the FCC had not justified the local television ownership rule (which prohibited an entity from owning more than one television

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[4] Congress recently amended § 202 to make the reviews quadrennial. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99.

station in a market unless at least eight independent stations would remain) and remanded that to the FCC as well.

In the wake of *Fox* and *Sinclair*, the FCC used the 2002 Biennial Review to review all of its media ownership rules.[5] Although the FCC's order below documents in great detail the explosion of competition in the media industry, the FCC refused to squarely address whether this transformation had undermined the scarcity doctrine. See Pet. App. 200a-204a, ¶¶ 13-16. And despite Congress's admonitions and the D.C. Circuit's remands, the resulting order again produced only modest deregulation.

1975 Newspaper Rule. The FCC sharply divided its analysis of the 1975 Newspaper Rule. First, the FCC found that the rule was no longer "necessary in the public interest" based on a careful assessment of record evidence regarding the FCC's three public interest goals related to competition, localism and diversity. As to competition, the FCC found that cross-ownership posed no threat and that the antitrust laws were sufficient to protect against such potential harms. Pet. App. 425a-435a, ¶¶ 331-341. As to localism, the FCC found that the ban on newspaper-broadcast cross-ownership "actually works to inhibit [the provision of local news and information] programming." *Id.* at 435a, ¶ 342. As to viewpoint diversity, the FCC found that the rule was no

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[5] In the 1998 Biennial Review, the FCC had retained the 1975 Newspaper Rule but concluded that a blanket ban "may not be necessary to achieve the rule's public interest benefits" and indicated that it would initiate a rulemaking. *1998 Biennial Regulatory Review*, 15 FCC Rcd. 11058, ¶ 83 (2000). Petitions to review the FCC's decision to retain the 1975 Newspaper Rule were held in abeyance pending the promised rulemaking proceeding. *NAA* v. *FCC*, No. 00-1375 (D.C. Cir., filed Aug. 16, 2000). The FCC initiated that rulemaking in 2001, *see Cross-Ownership of Broadcast Stations & Newspapers*, 16 FCC Rcd. 17283 (2001), and the FCC later incorporated the record in that rulemaking proceeding into the record developed for the 2002 Biennial Review, which parties then supplemented.

longer necessary because cross-ownership often results in superior local news programming with a greater mix of views. *Id.* at 447a-451a, ¶¶ 356-360. Equally important, the FCC found that common ownership has no predictably adverse effect on viewpoint diversity, and that the growth in media outlets had been so vast that no newspaper-broadcast combination could remotely dominate public debate. *Id.* at 451a-459a, ¶¶ 361-367.

Notwithstanding these findings, the FCC adopted new restrictions in the *Order* that continue to prohibit or restrict newspaper/broadcast cross-ownership in smaller markets. The FCC based these new restrictions, called Cross Media Limits ("CMLs"), upon a series of what it termed "conservative" assumptions that ensured that the rule would be overbroad. Pet. App. 433a-434a, 510a, ¶¶ 339, 442. The new CMLs prohibit newspapers from owning any TV or radio stations in markets with three or fewer TV stations. *Id.* at 516a-524a, ¶¶ 452-461. In markets with four to eight television stations, a newspaper publisher may own either (1) one TV station and up to half of the statutorily permitted limit of radio stations for that market, or (2) no TV stations and up to 100% of the radio stations permitted by the local radio limit. *Id.* at 524a-534a, ¶¶ 462-480. The FCC imposed *no* limit on the acquisition of television or radio stations by owners of any non-broadcaster entity other than newspapers.[6]

Local Ownership Rules. The FCC also made incremental changes to other restrictions on media ownership. For example, prior to the *Order*, the FCC prohibited firms from owning more than one television station in a market, except that a party could own two stations if there would be at least

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[6] The FCC also eliminated all restrictions on radio-television cross-ownership in large and medium-sized markets (which no party challenged below), but it inexplicably established a new prohibition on such cross-ownership in small markets. Pet. App. 460a-474a, 523a-524a, ¶¶ 370-390, 460.

eight independently owned stations remaining (the "eight voices" rule) and the two commonly owned stations were not both among the four most watched stations in the market (the "top four" rule). 47 C.F.R. § 73.3555(b). Responding to the D.C. Circuit's remand in *Sinclair*, the FCC fashioned a new local ownership rule that permitted a firm to own two stations in markets with up to 17 television stations, and three stations in markets with 18 or more stations, but the FCC retained the "top four" rule. Pet. App. 277a-357a, ¶¶ 132-234. Indeed, the FCC expressly found that ownership of multiple television stations increased local news, encouraged localism, and did not harm viewpoint diversity. *Id.* at 296a-316a, ¶¶ 155-180. With respect to radio ownership, the FCC left in place the numerical limits, including AM/FM service caps, established by Congress in the 1996 Act, Pub. L. No. 104-104, § 202(b), 110 Stat. at 110, and it made the geographic market definition more restrictive. Pet App. 357a-423a, ¶¶ 235-326.

4. Many media companies, including Petitioners, sought review of the *Order* in the D.C. Circuit. Certain advocates of greater regulation, however, sought review in various other circuits, including the Third Circuit. A lottery, conducted pursuant to 28 U.S.C. § 2112, selected the Third Circuit. Several media firms, supported by the FCC and the Justice Department, moved to transfer the case to the D.C. Circuit, in part because the D.C. Circuit had issued the remands that led to significant portions of the *Order*. The Third Circuit denied the motion, with Chief Judge Scirica dissenting.

In addition, the Third Circuit issued a stay of the *entire order* pending appeal. In a three-page order, the court of appeals concluded that the advocates of regulation would suffer irreparable harm if acquisitions permitted by the new order took place and the rules were later struck down (notwithstanding the possibility of divestiture). *Prometheus Radio Project* v. *FCC*, No. 03-3388 (3d. Cir. Sept. 3, 2003) (order).

After expedited briefing and argument, the Third Circuit found much of the order unlawful and remanded the matter to the FCC. With respect to the CMLs applicable to newspapers, the Third Circuit rejected constitutional challenges under the First and Fifth Amendments. Pet. App. 45a-47a. The court held that "[e]ven [if it] were [] not constrained by Supreme Court precedent," it would reaffirm the scarcity doctrine and deferential review under the First Amendment. *Id.* at 46a. The court also agreed with the FCC that newspaper/broadcast cross-ownership *benefits* localism and does not harm viewpoint diversity, and thus upheld the repeal of the blanket ban. *Id.* at 38a-42a. But it found the Commission's new rule unlawful; it faulted those aspects of the FCC's analysis that resulted in a rule that permitted a greater range of combinations. *Id.* at 47a-62a. The Third Circuit also found that the FCC had not justified the new, relaxed numerical limits in the local television ownership rule, *id.* at 64a-80a – thus pushing the FCC back toward a more restrictive rule like the one the D.C. Circuit struck down in *Sinclair*. The court also rejected all claims that the local radio ownership rule was too restrictive; indeed, it found that the FCC's retention of the numerical limits established by Congress in § 202 was too deregulatory and remanded for further consideration. *Id.* at 81a-105a. Chief Judge Scirica dissented, and would have upheld the order in its entirety. See *id.* at 131a-189a.

The Third Circuit remanded the order to the FCC, but did not vacate it. The court of appeals held, however, that "[t]he stay currently in effect will continue pending our review of the Commission's action on remand, over which this panel retains jurisdiction." Pet. App. 106a. Petitioner Tribune then filed a motion asking the court to modify the stay to permit newspaper/broadcast combinations in the largest markets where the FCC had determined that regulation was no longer necessary in the public interest. The court of appeals denied the motion. Subsequently, the court of appeals denied a

separate motion to lift the stay as it related to television/radio cross-ownership, even though it had acknowledged that no party had even challenged that rule. See *id.* at 37a n.22. The FCC and United States sought panel rehearing relating to certain aspects of the local radio ownership rules, which the Third Circuit granted in part (with respect to the more regulatory aspects of the rule, such as the tightened geographic standard) and denied in part on September 3, 2004. *Id.* at 673a. The Third Circuit indicated that it would not accept petitions for rehearing *en banc* because of the large number of recusals. *Id.* at 675a.

REASONS FOR GRANTING THE PETITION

Whether broadcast speech is entitled to full First Amendment protection and whether the government can single out newspaper owners for burdens on speech based upon any rational basis are two fundamentally important issues with wide applicability for the media and their readers, viewers, and listeners. The Third Circuit's resolution of the first issue places it in direct conflict with the D.C. Circuit, and this case presents each of the three conditions that this Court has indicated would separately justify examining whether broadcast speech should be subject to lesser First Amendment protections. The Third Circuit's resolution of the second issue misapplied controlling decisions of this Court and departed from the approach of other courts of appeals. And, the Third Circuit's review of the FCC's *Order* and perpetuation of the rules the FCC sought to revise create a conflict with other circuits regarding the proper application of § 202(h) of the 1996 Act.

I. THIS COURT'S REVIEW IS REQUIRED TO RESOLVE CONFLICT AND UNCERTAINTY REGARDING THE APPROPRIATE FIRST AMENDMENT STANDARD APPLICABLE TO REGULATION OF BROADCAST SPEECH.

Whether ownership restrictions that limit broadcast speech are to be reviewed under a rational basis test or under a First Amendment standard applicable to other types of speech is an issue that courts of appeals have long urged this Court to review and one that only this Court can resolve. This Court has several times over the past 30 years acknowledged that the dramatic technological and competitive developments that have reshaped the nation's media seem to have made the issue ripe for reconsideration. The time for such review is at hand. This Court's recent decisions affording greater First Amendment protection to speech delivered via the Internet and cable television systems have confirmed that the conditions justifying reduced protections for broadcast speech have disappeared. The Third Circuit's decision squarely presents the issue, creates conflicts regarding its resolution, and thus warrants review by this Court.

1. The Third Circuit's decision establishes a fundamental conflict over whether particular characteristics of the broadcast industry today justify lower First Amendment protection for broadcast speech. The Third Circuit concluded that, even apart from considerations of precedent, a rational basis test should apply to regulation of broadcast speech because the broadcast spectrum remains "scarce," and "[t]he abundance of non-broadcast media does not render the broadcast spectrum any less scarce." Pet. App. 46a. Under this rationale, broadcast speech will forever be afforded second-class protection.

In contrast, the D.C. Circuit has for decades maintained that developments have confirmed that there is no longer any defensible rationale, and certainly none related to spectrum scarcity, for applying a lesser standard of First Amendment

protection to broadcast speech. See, *e.g.*, *Telecommunications Research & Action Ctr.* v. *FCC*, 801 F.2d 501, 507-09 (D.C. Cir. 1986) (Bork, J., joined by Scalia and MacKinnon, JJ.). Although that court has acknowledged that it is bound by *Red Lion*, members of the court have subjected that decision's rationale to "intense criticism." *Radio-Television News Directors Ass'n* v. *FCC*, 184 F.3d 872, 877 n.3 (D.C. Cir. 1999) (internal quotation omitted). "Partly this [criticism] rests on the perception that the 'scarcity' rationale never made sense .... And partly the criticism rests on the growing number of available broadcast channels." *Time Warner Entm't Co.* v. *FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (per curiam) (Williams, J., joined by Edwards, C.J., Silberman, Ginsburg, and Sentelle, JJ., dissenting from denial of rehearing en banc). And this criticism has been voiced by a wide range of circuit members. See, *e.g.*, *Action for Children's Television* v. *FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) (Edwards, C.J., dissenting) ("it is no longer responsible for courts to apply a reduced level of First Amendment protection for regulations imposed on broadcast based on the indefensible notion of spectrum scarcity"); *Syracuse Peace Council* v. *FCC*, 867 F.2d 654, 682-83 (D.C. Cir. 1989) (Starr, J., concurring). Members of other courts of appeals have reached similar conclusions at odds with the Third Circuit. See, *e.g.*, *Arkansas AFL-CIO* v. *FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (en banc) (Arnold, R., C.J., concurring in judgment) ("The Supreme Court believed, almost 25 years ago, that broadcasting was sufficiently special to overcome this instinctive feeling of alarm [over threats to speech]. In my opinion, there is a good chance that the legal landscape has changed enough since that time to produce a different result.").

2. This Court has indicated that it would be appropriate to revisit the spectrum scarcity rationale (and the lesser protection afforded broadcast speech) in any of three circumstances, each of which is present in this case.

First, in *Red Lion* itself, this Court stated that "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." *Red Lion*, 390 U.S. at 393. The FCC itself has found that the sweeping cross-ownership rules enacted in 1975 and perpetuated by the Third Circuit have had just this effect. The FCC concluded that the prohibition "actually works to inhibit [local news and information] programming" because combinations of newspapers and broadcasts can and do enhance the quality and quantity of local coverage. Pet. App. 435a, ¶ 342. The FCC found similar benefits for the diversity of viewpoints arising from newspaper-broadcast combinations:

> the synergies and efficiencies that can be achieved by commonly located newspaper/broadcast combinations can and do lead to the production of more and qualitatively better news programming and the presentation of diverse viewpoints, as measured by third parties.

Id. at 449a, ¶ 358. The Third Circuit upheld the FCC's reasoning on these points, even as the court's order perpetuated the 1975 Newspaper Rule. *Id.* at 38a-42a.[7] That rule thus has had exactly the speech-inhibiting effect that this Court has indicated should call into question the merits of subjecting broadcast speech to lesser First Amendment protections, a standard that ensures that the FCC's revised cross-ownership rules (and the Third Circuit's injunction continuing the 1975 Newspaper Rule and local ownership rules) will continue to impair protected speech.

Second, this Court long ago stated that, due to the growth of alternative channels of communication and specifically cable

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[7] The FCC also found specific speech-enhancing benefits from common ownership of local television stations (Pet. App. 283a-320a, ¶¶ 140-184) and from radio-television cross-ownership (*id.* at 473a-474a, ¶ 390).

television channels, "[s]carcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*." *CBS*, 412 U.S. at 158 n.8 (plurality opinion) ("It has been predicted that it may be possible within 10 years to provide television viewers 400 channels through the advances of cable television."). When this Court decided *Red Lion* and *NCCB*, the cable television industry was in its infancy and served mainly as a retransmitter of broadcast programming. Today, the scarcity identified in *CBS* has disappeared. Only a small percentage of households lack access to cable television or direct broadcast satellite (DBS) service, and "there are more than 308 satellite-delivered national non-broadcast television networks available for carriage over cable, DBS, and other [video] systems," with other channels dedicated to local public affairs programming and pay-per-view offerings. See, *e.g.*, Pet. App. 272a-273a, ¶ 123; *Turner I*, 512 U.S. at 628-29. Only in the last two decades has direct-to-home satellite become widely available. And the Internet as a popular medium did not exist when *Red Lion* was decided, but now functions as a principal and wildly popular source of information and news, often outpacing its broadcast, cable, and print competitors. See, *e.g.*, *Ashcroft* v. *ACLU*, 535 U.S. 564, 566 (2002) (plurality opinion).

Third, this Court more than 20 years ago acknowledged that "[t]he prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years," and the rationale might be reexamined upon "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *League of Women Voters*, 468 U.S. at 376 n.11. Short of setting a flare on the Court's front steps, both the FCC and Congress could not have provided a clearer signal. More than a decade ago, it was observed that "[i]n the 1985 Fairness Report, the Commission sought to respond to the Supreme Court's invitation to send it a 'signal'" and "found that the 'scarcity

rationale,' which has historically justified content regulation of broadcasting, is no longer valid." *Meredith Corp.* v. *FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987) (internal citation omitted); *id.* ("In addition, the Commission found that the explosive growth of information sources ... made the fairness doctrine no longer necessary to assure that the public has access to a variety of viewpoints."); see *Syracuse Peace Council* v. *WTVH*, 2 FCC Rcd. 5043, ¶ 65 (1987) (subsequent history omitted) ("the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press"). Others have noted this result: "the FCC has given the 'signal' referred to in *League of Women Voters, supra.* The Commission has indicated ... that the problem of spectrum scarcity is rapidly disappearing." *Arkansas AFL-CIO*, 11 F.3d at 1442-43 (Arnold, R., C.J., concurring in judgment) (citing *Syracuse Peace Council*, 2 FCC Rcd. 5043 (1987)); *Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d 143 (1985), *vacated*, *Radio-Television News Directors Ass'n* v. *FCC*, 831 F.2d 1148 (D.C. Cir. 1987). And, against the backdrop of stability of ownership of existing broadcast licenses, Congress has increasingly relied upon the auction process to allocate new licenses. See, *e.g.*, Balanced Budget Act of 1997, Pub. L. No. 105-33, tit. II, 111 Stat. 251, 257. This has displaced the Commission's role in "'choos[ing] among applicants for the same facility,'" which had underpinned the FCC's authority to regulate to enhance viewpoint diversity. See, *e.g.*, *NCCB*, 436 U.S. at 802. Indeed, Congress clearly does not believe that spectrum remains "scarce" within the meaning of *Red Lion*; Congress has ordered the FCC to reclaim spectrum that had been allocated predominantly for broadcast uses (including television channels 52-69) and either auction or re-allocate it to other uses (*e.g.*, first responders and wireless services) at the conclusion of the ongoing digital transition. See *Second Periodic Review of the Commission's Rules & Policies*

Affecting the Conversion to Digital Television, 19 FCC Rcd. 18279, ¶ 11 (2004); 47 U.S.C. § 336(c).

The proceedings at issue here also reflect a clear signal from Congress and the FCC. Congress in the 1996 Telecommunications Act recognized that technological and competitive developments had transformed the nation's media. Congress there repealed or relaxed several important regulations of traditional media. Pub. L. No. 104-104, § 202(a)-(g), 110 Stat. at 110-11. It also directed the FCC to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate" its existing local television ownership limitations, and directed a biennial review "to determine whether any of such [remaining] rules are necessary in the public interest" – commanding the FCC to "repeal or modify any regulation it determines to be no longer in the public interest." *Id.* § 202(h), 110 Stat. at 111-12.

When the FCC undertook that review, resulting in the order at issue here, it concluded that "the local media marketplace has changed dramatically" since the cross-ownership rule's adoption in 1975 and traced the growth of cable television, the Internet, and other electronic media. Pet. App. 242a-276a, ¶¶ 86-128. Indeed, it determined that retaining the broad broadcast-newspaper cross-ownership rule adopted in 1975 was not in the public interest because "competing media outlets abound in markets of all sizes" and, "[i]ndeed, the question confronting media companies today is not whether they will be able to dominate the distribution of news and information in any market, but whether they will be able to be heard at all among the cacophony of voices vying for the attention of Americans." *Id.* at 455a-458a, ¶¶ 365-367. The FCC itself indicated in the notice introducing this proceeding that a higher First Amendment standard may be required, *1998 Biennial Regulatory Review*, 15 FCC Rcd. 11058, ¶¶ 115-117 (2000) (suggesting that intermediate scrutiny may be applicable), and its assessment of industry developments – if not its application of the correct constitutional standard – all

but formally re-issued the death certificate for the scarcity doctrine.

3. At a minimum, this Court's review is necessary to resolve a conflict among the circuits regarding whether the FCC can continue to regulate broadcast ownership and content as though a rational basis test were applicable even while confirming that media competition has increased far beyond that imaginable when *Red Lion* and *NCCB* were decided. The D.C. Circuit has pointedly indicated that the FCC may well "be thought arbitrary and capricious if it refused to reconsider its rule in light of persuasive evidence that the scarcity rationale is no longer tenable." *Tribune Co.* v. *FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998). Here, the Third Circuit rejected arguments that the FCC had acted arbitrarily by setting out the basis for concluding that the scarcity rationale was no longer tenable, refusing to address the implications of those findings for the scarcity doctrine, and then adopting rules that depended on the doctrine's continued viability. See Pet. App. 45a-47a.

II. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS REGARDING THE TREATMENT OF REGULATION THAT SINGLES OUT A PARTICULAR COMMUNICATIONS MEDIUM OR CLASS OF SPEAKERS.

The FCC's newspaper-broadcast cross-ownership rules single out newspapers owners and limit their ability to speak through the acquisition and operation of television and radio stations. The rules do not similarly limit the speech of owners of cable television systems, Internet sites and delivery systems, or telephone-based information delivery systems. The Third Circuit rejected newspaper owners' claims that such rules violate the equal protection component of the Due Process Clause as well as the First Amendment. It did so in conflict with the decisions of this Court and other courts of appeals.

1. The Third Circuit claimed that *NCCB* mandated its equal protection conclusion, Pet. App. 44a-45a, but *NCCB* in fact precludes the Third Circuit's approach. In *NCCB*, this Court addressed an equal protection challenge to the 1975 Newspaper Rule. It did so separately, and under a different standard, from its consideration of broadcast speech regulation. 436 U.S. at 801-02. It rejected the equal protection challenge because "the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications" and did not "limit the circulation of information to which the public is entitled." *Id.* at 801 (internal citation omitted).

The Third Circuit reasoned that this Court's conclusion *in 1978* that all "major media" were treated alike required an identical conclusion *today*. Pet. App. 44a. This construction and application of the *NCCB* test precludes courts from undertaking precisely the inquiry mandated by this Court: to determine whether differential treatment in fact gives rise to equal protection concerns. In 1978, the equivalent treatment of major media barred an equal protection challenge. In 2005, the limitation on the speech of newspaper owners – but not owners of other major media such as cable television systems or Internet websites – gives rise to an equal protection challenge through a simple and direct application of *NCCB*. Indeed, newspapers are the only non-broadcast media today that are subject to any restrictions on the ownership of broadcast stations. Cf. *Fox*, 280 F.3d at 1050-53.

Nor, contrary to the Third Circuit's suggestion, Pet. App. 44a, can there be any doubt that media unregulated by the FCC's rule – such as cable television systems and the Internet – are "major media" for purposes of this Court's test, and have developed as such only since 1978. See *Turner I*, 512 U.S. at 628-29; *Reno* v. *ACLU*, 521 U.S. at 849-54. As the FCC found, there were 68.5 million cable subscribers in 2000; indeed, the substantial majority of Americans today

watch TV delivered by cable and direct broadcast satellite systems, not through over-the-air reception. See Pet. App. 269a-270a, ¶ 120. Similarly, the Internet's development as a "major medium" was many years away in 1978. The FCC found that 42.5 million households subscribed to an Internet service provider in 2000, acquiring access to over 30 million websites in that year – totals which have grown dramatically in the intervening period. See *id.* at 267a-270a, ¶¶ 117-120. The differential treatment of newspapers is particularly anomalous in light of this Court's recent determinations that speech of cable television operators and Internet communications are entitled to heightened First Amendment protections. See *Turner I*, 512 U.S. at 636-44; *Reno*, 521 U.S. at 849-53.[8]

The Third Circuit also departed from *NCCB*'s equal protection analysis by ignoring the other component of this Court's analysis, addressing the effect on information available to the public. See *NCCB*, 436 U.S. at 801-02. Even though the Third Circuit upheld the FCC's conclusions that the cross-ownership rule inhibits the quality and quantity of speech, Pet. App. 38a-42a; see also *id.* at 425a-460a, ¶¶ 331-369, it simply disregarded this conclusion in addressing the newspaper owners' equal protection challenge. This approach cannot be squared with *NCCB*.

2. The Third Circuit's determination to apply no heightened scrutiny to the FCC's rule also conflicts with other decisions of this Court. "[L]aws that single out the press, or certain elements thereof, for special treatment pose a particular danger of abuse by the State." *Turner I*, 512 U.S. at 640 (internal citation omitted). This principle applies directly to government restrictions that distinguish between different

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[8] Indeed, the FCC's station ownership rules also impermissibly impose burdens on incumbent owners of television and radio stations that are not imposed on owners of cable television systems and Internet sites and services.

classes of media outlets. See *id.* at 641. Even if the restrictions are not content-based, rules that single out a medium for unique restrictions on speech are subject to heightened scrutiny and must be "narrow[ly] tailor[ed]" to and "'no greater than is essential to furtherance'" of a "substantial[]" government interest. *Id.* at 662; see also *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 585, 592-93 (1983) (such differential regulation is "presumptively unconstitutional" and "places a heavy burden on the [government] to justify its action").

The Third Circuit's decision also conflicts with *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984). There, this Court considered a federal statute that prohibited owners of noncommercial educational broadcast stations from editorializing. It held that heightened scrutiny applied because the statute "single[d] out noncommercial broadcasters and denie[d] them the right to address their chosen audience on matters of public importance." *Id.* at 384. Heightened scrutiny applied to this *singling out* of a certain class of speakers for special restrictions, even if the scarcity doctrine deprives broadcasters more generally of the highest degree of First Amendment protection. *Id.* at 376-81. The FCC's restrictions on newspapers' ownership of broadcast stations, like the statute in *League of Women Voters*, "singles out" one class of speakers (newspapers) for restrictions on speech that do not apply to other media owners, such as cable and Internet websites – and therefore must be subject to heightened scrutiny.

3. Other courts of appeals have applied these principles in a manner at odds with the Third Circuit's approach. For example, both the Fourth Circuit and the Ninth Circuit applied intermediate scrutiny and declared unconstitutional a federal law that prohibited local telephone companies from providing video programming in competition with cable television providers. See *Chesapeake & Potomac Tel. Co.* v. *United States*, 42 F.3d 181, 198 (4th Cir. 1994); *U S WEST,*

Inc., 48 F.3d 1092, 1100 (9th Cir. 1994). As these courts held, minimal scrutiny is inappropriate because the statute is not "generally applicable; it regulates only local common carriers" and "by its plain terms, infringes upon protected speech." *Chesapeake & Potomac*, 42 F.3d at 192; see also *U S WEST*, 48 F.3d at 1100. Other circuits have also recognized that singling out certain speakers for special restrictions requires heightened scrutiny. See, *e.g., Sinclair*, 284 F.3d at 168 ("more than minimal scrutiny may be required when a class of broadcasters is singled out"); *News Am. Pub'g, Inc.* v. *FCC*, 844 F.2d 800, 812 (D.C. Cir. 1988).

4. Review is especially warranted because the FCC's rules give rise to the risks of content-based regulation. In contrast to content-neutral structural regulation that addresses the time and place of speech, the FCC's regulation of newspaper ownership targets particular persons for additional regulation of their speech. Compare *Minneapolis Star & Tribune Co.*, 460 U.S. at 592-93; *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 228 (1987). Both the FCC, see, *e.g.*, Pet. App. 479a-480a, 484a-488a, 509a-510a, ¶¶ 399, 406-409, 441-442, and the Third Circuit, see, *e.g.*, *id.* at 44a, 51a-56a, attempted to justify the newspaper broadcast cross-ownership rule based on the nature of the speech that each identified with newspaper owners. Because they perceived newspaper owners as providing particularly influential views on matters of importance to local communities, they concluded that newspaper owners should be subject to *additional*, unique limitations on speech. See *id.* at 484a-488a, ¶¶ 406-409; *id.* at 44a, 51a-56a. This turns the First Amendment on its head: the persuasiveness or importance of a party's speech is supposed to trigger increased First Amendment protection, see, *e.g., Turner I*, 512 U.S. at 658; *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam) ("government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others"), but in the circus-mirror universe of broadcast regulation, the value of speech

produced by newspaper owners is invoked to justify restricting their speech. Only this Court can correct the fundamental unfairness inherent in singling out newspapers for a discriminatory and harmful disability on its freedom of speech.

III. THE THIRD CIRCUIT'S APPLICATION OF SECTION 202(H) IS IN CONFLICT WITH THE APPROACH OF THE D.C. CIRCUIT.

1. This Court's review is also necessary to resolve a conflict over the proper role of § 202(h) in both the FCC's review of media ownership rules and judicial review of such orders. Because § 202(h) embodies a clearly deregulatory mandate, the D.C. Circuit has undertaken an especially searching review of the FCC's justification for the retention of any media ownership restrictions. See, *e.g.*, *Fox*, 280 F.3d at 1044 (§ 202(h) creates a presumption in favor of deregulation that can be "likened to Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')"). By contrast, the Third Circuit held that § 202(h) does not require a reviewing court to treat such proceedings any differently than it would any other appeal under the Administrative Procedure Act. Pet. App. 25a-34a.

Thus, whereas the D.C. Circuit has consistently vacated FCC decisions to retain or modestly relax media ownership rules as insufficiently deregulatory under § 202(h), the Third Circuit in this case did not undertake the same skeptical review of the FCC's justifications for retaining restrictions, but instead criticized and remanded only the deregulatory aspects of the *Order* (and lifted the stay on only the increased regulation of radio ownership). These starkly divergent approaches cannot be reconciled, and place the FCC in an untenable position. Indeed, the tension is most acute with respect to the local television ownership rule: the D.C. Circuit remanded the previous version of the rule to the FCC as insufficiently deregulatory (*Sinclair*, 284 F.3d at 162-65), but the Third Circuit has now remanded the FCC's attempt to

respond to that remand as *too* deregulatory, Pet. App. 75a-78a. Keeping the media ownership rules in this whipsaw compounds the uncertainty created by any circuit conflict and will severely impair the ability of newspapers and broadcasters to compete and serve their readers, viewers, and listeners in the media marketplace. Only this Court can resolve these tensions.

2. The Third Circuit's decision also created a conflict with the D.C. Circuit regarding § 202(h)'s implications for post-review disposition of the FCC's periodic orders applying that section. The D.C. Circuit has held that the deregulatory mandate of § 202(h) acts as a thumb on the scale in favor of more extensive deregulatory remedies on judicial review. *Fox*, 280 F.3d at 1047-50. Thus, § 202(h) led the D.C. Circuit to vacate the cable/broadcast cross-ownership rule, even though the court might only have remanded the order in a normal APA case. *Id.* at 1052-53. In stark contrast, the Third Circuit continued to stay even those deregulatory aspects of the *Order* that it found unobjectionable, even though the Third Circuit had expressly acknowledged the D.C. Circuit's position on remedies, Pet. App. 29a-32a.

The Third Circuit exacerbated this conflict by retaining the stay, entered in aid of its assertion of jurisdiction over future review proceedings of whatever orders the FCC issues on remand, without applying the equitable standards applicable to a stay. Pet. App. 106a. Even after motions by Petitioners, the court refused to modify the stay as it related either to relaxation of the newspaper-broadcast cross-ownership rule (where the Third Circuit had itself endorsed the FCC's conclusions supporting elimination of the blanket 1975 prohibition on cross-ownership) or even the TV-radio cross-ownership rule (where the FCC's deregulatory actions had not been challenged by any party).

In contrast, other courts of appeals have recognized that the All Writs Act, 28 U.S.C. § 1651, governs the courts of appeals' determinations regarding stays, which are

"extraordinary" remedies available only where a subsequent appeal "'can promise no more than a clearly inadequate remedy.'" *In re GTE Serv. Corp.*, 762 F.2d 1024, 1026-27 (D.C. Cir. 1985); see also *Sampson* v. *Murray*, 415 U.S. 61, 83-84 (1974). Especially when an appellate court acts to protect its jurisdiction over a subsequent appeal, as the Third Circuit did, "[petitioners] must also satisfy the normal requirements, so to speak, for all extraordinary relief – *i.e.*, the well established requirements that we routinely apply to motions for a stay pending appeal, among which is likelihood of irreparable harm." *Reynolds Metals Co.* v. *FERC*, 777 F.2d 760, 764 (D.C. Cir. 1985) (Scalia, J.). The Seventh Circuit, too, has adopted a rule at odds with the Third Circuit's: "A judicial order that prevents a statute, regulation, or administrative decision from taking effect is an injunction and must be justified under the standards commonly used to evaluate judicial interference with the decisions of the political branches of government. We have made this clear even for orders denominated 'stays' by Appellate Rule 18." *Illinois Bell Tel. Co.* v. *WorldCom Techs., Inc.*, 157 F.3d 500, 503 (7th Cir. 1998) (Easterbrook, J.) (citing *Commonwealth-Lord Joint Venture* v. *Donovan*, 724 F.2d 67 (7th Cir. 1983), and *Adams* v. *Walker*, 488 F.2d 1064 (7th Cir. 1973)).

The Third Circuit's interpretation and application of § 202(h) thus not only conflicted with the D.C. Circuit's approach to remedies, but led the Third Circuit to depart from the more general principles applicable to remedies following review. Only this Court's review can establish consistency among the different courts of appeal that will continue to review the FCC's periodic orders addressing the proper scope of media regulation.

CONCLUSION

The petition for a writ of certiorari should be granted.

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